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HOW SECULAR IDEOLOGY IS MARGINALIZING THE RULE OF LAW AND CATHOLIC CONTRIBUTIONS TO LAW AND SOCIETY II: THE TEN COMMANDMENTS AND THE REJECTION OF DIVINE LAW IN AMERICAN JURISPRUDENCE

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INTRODUCTION

State-enforced discrimination that exiles displays of the Ten Commandments from the public forum infringes more than the free exercise of religion: It symbolizes the death of natural law and the rule of law in American jurisprudence. Unless this is understood and rectified, all that will remain is hostility toward religion, rule by law, and the supremacy of the secular state.

I. THE ROLE OF THE TEN COMMANDMENTS IN NATURAL LAW

The Ten Commandments have deep legal significance, for natural law is inseparable from God's divine laws revealed of a new civilization. In a system of natural law, moral values and mutual obligations would establish a just society, held together by the rule of law built upon the foundation of God's laws.

Thus, the Ten Commandments were not intended to be historical fossils carved in stone as a remembrance of the legal heritage of this nation. The Ten Commandments are meant to be the living stones upon which we build our lives in relation to God and our fellow man; they are meant to act as the bedrock of

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diverse organized religions, to infuse human laws with moral certainty, and to create absolute standards of right and wrong.

II. THE ATTACKS

Over the last 100 years, two-pronged constitutional attacks were mounted against the teachings of the Ten Commandments. The first prong of the attack took place under the Due Process Clause of the Fourteenth Amendment and resulted in the legalization of conduct that is in disobedience to the Ten Commandments. *Roe v. Wade*,¹ for example, changed the law to permit abortion in violation of the commandment not to murder human life. This decision was followed by *Lawrence v. Texas*,² which legalized homosexual sodomy, and heralded the coming end to all morals legislation.³

The second prong of the attack utilizes the First Amendment to discriminate against Christians. The assault is based on the mythical separation of Church and State and argues that the text of the Ten Commandments may not be publicly displayed on government property. The latter attack is the focus of this Article, although some of my observations may have applicability to the first attack.

III. THE FAILURE OF THE U.S. SUPREME COURT

In *McCreary County v. ACLU of Kentucky*,⁴ and *Van Orden v. Perry*,⁵ a sharply-divided U.S. Supreme Court continued to embarrass itself by failing to give clear guidance as to the legality of displays of the Ten Commandments. In *McCreary*, the

¹ 410 U.S. 113, 153–54, 158–61 (1973) (holding that the Fourteenth Amendment or the Ninth Amendment creates a broad enough personal privacy right to encompass a woman's decision to terminate her pregnancy, and that an unborn fetus is not a "person" for purposes of the Fourteenth Amendment, despite the widely held belief that life begins at conception).

² 539 U.S. 558, 573–78 (2003) (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986), by holding the Texas sodomy law, which outlawed homosexual lifestyle practices, unconstitutional as a violation of the Due Process Clause of the Fourteenth Amendment).

³ See *id.* at 599 (Scalia, J., dissenting) (stating that the Court's holding "effectively decrees the end of all morals legislation").

⁴ 545 U.S. 844 (2005).

⁵ 545 U.S. 677 (2005).

display was ordered removed,⁶ but in *Van Orden* the Supreme Court permitted the Ten Commandments to remain on display.⁷

In our lifetime, court battles have been fought over displays of the Ten Commandments inside public schools,⁸ inside a courthouse,⁹ and on the lawns of public property.¹⁰ The lack of clear guidance from the Supreme Court has thrust lower courts into taking on a micromanaging role to decide cases that turn on trivial details such as whether the Ten Commandments displays are be clumped together with a remembrance of Davy Crockett and the Alamo (acceptable);¹¹ or near a very large clock (not acceptable);¹² or next to the Magna Carta and the Declaration of Independence (not acceptable);¹³ or next to the American flag and an American Eagle (not acceptable);¹⁴ or next to a historical marker and a no-skateboarding sign (acceptable).¹⁵ So long as

⁶ *McCreary*, 545 U.S. at 850, 881 (upholding a preliminary injunction on the display of the Ten Commandments in a courthouse).

⁷ *Van Orden*, 545 U.S. at 688, 691–92 (holding that the display of the Ten Commandments on government property outside a state capitol did not violate the Establishment Clause).

⁸ *See, e.g., Stone v. Graham*, 449 U.S. 39, 39–41 (1980) (addressing a state statute that required the Ten Commandments posted on the wall of each public classroom in the state, and holding the law unconstitutional).

⁹ *See McCreary*, 545 U.S. at 850–51.

¹⁰ *See Van Orden*, 545 U.S. at 681.

¹¹ *Id.* at 681 & n.1.

¹² *Adland v. Russ*, 307 F.3d 471, 475 (6th Cir. 2002) (holding that a monument inscribed with the Ten Commandments on grounds near the state's floral clock was unconstitutional under the Establishment Clause).

¹³ *McCreary*, 545 U.S. at 856, 881 (upholding a preliminary injunction against the public display of the Ten Commandments with framed copies of the Magna Carta, Declaration of Independence, Bill of Rights, Star Spangled Banner lyrics, Mayflower Compact, National Motto, the preamble to the state constitution, and a picture of lady justice). *But see ACLU v. Mercer County*, 432 F.3d 624, 626 (6th Cir. 2005) (holding that a display entitled "Foundations of American Law and Government" in a courthouse that included the Mayflower Compact, the Declaration of Independence, the Ten Commandments, the Magna Carta, the Bill of Rights, and more, lacked a religious purpose, did not endorse religion, and therefore was constitutional); *Books v. Elkhart County*, 401 F.3d 857, 858 (7th Cir. 2005) (holding that a display of the Ten Commandments on public property, along with eight other historical documents and images and state and national flags, was constitutional).

¹⁴ *Books v. City of Elkhart*, 235 F.3d 292, 296, 303–04 (7th Cir. 2000) (holding that the public display of the Ten Commandments with an "all-seeing eye" and an American eagle grasping an American flag endorses religion and therefore violates the Establishment Clause).

¹⁵ *Freethought Soc'y of Greater Phila. v. Chester County*, 334 F.3d 247, 254, 270 (3d Cir. 2003) (holding that the display of a plaque containing the Ten Commandments was constitutional, where the plaque was also near plaques addressing building access, a plaque for the National Register of Historic Places, and

the Ten Commandments are viewed as relics without moral or legal authority, and are intended to have a secular purpose, they may be displayed as historical artifacts.

It is the eye of the beholder (the judge), who ultimately determines whether or not an impugned display offends the sensibilities of those who fear the reintegration of law with morality infused with religious values, and thereby constitutes the endorsement or advancement of religion.

Those hostile to God readily engage in constitutional battles over the Ten Commandments, elevating the trivial into the proverbial federal case, by making benign signs and postings subject to challenge. There are plenty more future cases to litigate.

IV. ASSESSMENT

I have examined these latest and earlier cases to find some thread of consistency to guide future conduct, and not finding principled judgments upon which to guide future conduct, I conclude that the current Establishment Clause jurisprudence is ridiculous, offends the doctrine of precedent, and boils down to the "clear obscurity" of the swing voter on the Supreme Court, rather than the rule of law. The entire line of cases that have led to the conflicting results in the twin cases of *McCreary* and *Van Orden* ought to be abandoned, and replaced with a bright-line precedent in favor of religious liberty that will not only celebrate, but also unapologetically observe, the Ten Commandments in public life.

V. NEUTRALITY IS HOSTILITY

Our civilization is built upon the values that are contained in the Ten Commandments and derived from natural law. To adopt a posture of assumed "neutrality" is in essence hostility toward God and the rule of law. Without taking a firm stand to reclaim our moral heritage, this nation will crumble from within.

The signs of social disintegration and the loss of moral fabric are evident. The First Amendment, which was intended to defend our way of life from attack by our enemies, ought not to be the seed that leads to its self-destruction by those who are offended that God's law is the backbone of our civilization.

VI. THE REAL BATTLE

It is my contention that the foundational issue at the heart of this debate is whether natural law, and in particular, divine law, is part of American jurisprudence. If it is, then to publicly display the Ten Commandments honors much more than a fossilized heritage, but a living *supra* Constitution that serves as an eternal standard for human laws that are prone to result in injustice and that can license immoral conduct. If natural law has been rejected and supplanted by a regime of legal positivism that deviates from natural law, however, then it makes sense to tear down ornamental displays of the Ten Commandments, beginning with the one in the courtroom of the Supreme Court of the United States itself, lest we hypocritically pay lip service to the Ten Commandments after we have pronounced the human gods on the Supreme Court to be the final arbiters of what is legal and just. Indeed, that would be the crowning achievement in the ultimate cleavage between God and the United States.

VII. SPIRITUAL WARFARE

To understand the furious tempest about public displays of the Ten Commandments that has shaken the Supreme Court, it is vital to set out just what the Ten Commandments mean and what their place is in natural law. The Ten Commandments are at their foundation a legal system built upon a foundation of love, by a lawgiver of love—God. It was Love that gave the Ten Commandments to the nation of Israel.

God gave divine law to human beings to direct them in their thoughts and actions, for human laws are inadequate when it comes to knowing the hidden desires of the heart. Observance of the Ten Commandments is proof of our love of God and gives human beings the framework of constitutional government that promotes respect, dignity, autonomy, and equality. Obeying God's commandments secures for all human beings the earthly blessings of life, liberty, and the pursuit of happiness.

What if there were an absence of love and respect for one another? Does it matter if we disobey just one of God's commandments?

As human beings, we recognize in our conscience the murder of the innocent to be a grave injustice. This is a self-evident truth, for it is a natural law that is inscribed in our hearts, enabling our conscience to distinguish the difference between

right and wrong. A human law that punishes the wicked for murder is in harmony with divine law and natural law, for there is justice in the result. A human law that permits the killing of innocent human beings, however, is a perversion for it lacks moral authority and is a void law, being contrary to the divine law that is integral to the natural law. Dressing up murder in the clothing of a lawful act does not transform its underlying character of naked lawlessness and injustice. An unjust law is an act of violence for it is contrary to both the divine law and to natural law.

VIII. DISOBEDIENCE RESULTS IN INJUSTICE

In current American jurisprudence, human law is superior to natural law, and disobedient of God's commandments.

In America, human laws that permit abortion provide proof that our courts and legislatures have supplanted God's laws, by succumbing to the temptation to be like God. Ignored is God's warning that "from man in regard to his fellow man I will demand an accounting for human life."¹⁶

Instead, a jurisprudence of legal positivism reigns, where law needs no validation other than the coercive ability of the state to enforce its rules. Law is not the service of justice; rather, law imposes the coercive political will of human beings who are legally defined as persons and thus hold the balance of power, for good or for evil. For the legal positivists, the source of the law is not God, but man. In this model lies the seed of tyranny. Law is used as a means to an end, and the inevitable result is injustice.

IX. NATURAL LAW

Natural law is paramount to any human law. The text of the Ninth Amendment of the Constitution offers support: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."¹⁷ Thus, there remains an entire body of legal rights retained by the people, including presumably a vast reservoir of natural law embedded in the common law from which American law is derived.

¹⁶ *Genesis* 9:5 (New American).

¹⁷ U.S. CONST. amend. IX.

Historically, the common law of England was inseparable from natural law. William Blackstone imparted natural law principles to his students at Oxford, teaching them that God's eternal unchanging laws comprehensively addressed good and evil, and that these laws were discoverable by human reason, and applicable to all human conduct. So long as human laws (positive law) conformed to natural law (including the divine commandments of the Decalogue), individual happiness was assured. The pursuit of happiness was thus linked to natural law, which protects the family and parental authority (Fourth Commandment); protects human life (Fifth Commandment); the unity of a man and a woman in marriage (Sixth Commandment); property (Seventh Commandment); honor (Eighth Commandment); and protects us from the greed jealousy and wrongful desires of others who covet what we possess and enjoy (Ninth and Tenth Commandments).¹⁸

Our founders, including Alexander Hamilton and George Mason, were schooled in the works of Sir Edward Coke and Sir William Blackstone, for their writings echoed the common law jurisprudence that any human laws that were contrary to natural law were void and of no effect. The Ten Commandments are the cornerstone of American civilization because they articulate the law of obligations and responsibilities that govern the freedom of individuals.

Remembering the Ten Commandments and their place in American jurisprudence is fundamental to ensure God's future blessings upon America, for the alternative is to be cursed with disasters of biblical proportions.

X. THE ROOT OF THE CONFLICT IN THE SUPREME COURT

Cutting to the core issue is the dissent in *Van Orden*, authored by Justice Stevens, who voted to remove the monument because it sent a message that "there is one, and only one, God."¹⁹ Thus, he recognized that the Ten Commandments are the sacred, authoritative, and literal words of God that command His worship and that of no other deity.

The implications of Justice Stevens's dissent are clear. God's divine law is an imperative that must be obeyed, and if the

¹⁸ *Deuteronomy* 5:6–5:21.

¹⁹ *Van Orden v. Perry*, 545 U.S. 677, 712 (2005) (Stevens, J., dissenting).

government chooses to endorse the public honoring of this divine legal code as America's supra Constitution, it will send the message that all human-made law in America is inferior and subordinate to the ultimate authority of God.

The most significant contribution to this debate is offered by Justice Scalia and his observation that "the Ten Commandments are a foundation of the rule of law, and a symbol of the role that religion played, and continues to play, in our system of government."²⁰

Justice Scalia's definition of the rule of law differs from mine. I define the "rule of law" as government by laws that people of moral conscience are willing to obey because the laws are inherently just. The ideal of the "rule of law" is to live in a democratic society that places constitutional limits on the power of government, permanently protects inalienable human rights and fundamental freedoms from undue encroachment, and provides equality before laws administered by an independent judiciary. I define "rule by law" as the antithesis of the "rule of law," meaning to be governed by unjust laws in any society—including democratic societies—where the government may exercise arbitrary powers and may abridge at will inalienable human rights and remove from constitutional protection the inalienable civil rights of any human being. The main difference between these opposite concepts is that *justice* is the defining characteristic in a society governed by the "rule of law," and deferential coerced obedience is the defining characteristic in a "rule by law" society.

Without a moral component that squares with the eternal and natural law of God that objectively sets up a standard of righteousness, there can be no rule of law, but the tyrannical imposition of rule by law. It is a mistake to label mere legality as compliance with the rule of law. Justice Scalia emphasizes legality over justice. His instincts, however, lead him to the underlying war that is at the heart of the battle to display the Ten Commandments. That war is the struggle for legal supremacy, between God's infallible divine laws that give shape to natural law that is imbued with justice, and fallible human-

²⁰ *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 907 (2005) (Scalia, J., dissenting).

made law that artificially erects a parallel legal system that is often prone to injustice.

Human beings cannot serve two masters. The first Commandment explicitly states, "You shall not have other gods besides me."²¹ Where there is a collision between the law of God and the law of Government, a choice must be made. Only the natural law known to the Founding Fathers is perfectly compatible with the Ten Commandments.

To a Supreme Court dominated by philosophical relativism, which recognizes only relative truth and relative values, and that has long ago discarded natural law and God as the ultimate law maker, public displays of the Ten Commandments represent the thin edge of the wedge that just might uproot the jurisprudence of realism that feeds the growth of the secular humanism.

This is why those on the Supreme Court who reject the revival of natural law resist upholding the constitutionality of public displays of the Ten Commandments. Justice Stevens concluded: "If a State may endorse a particular deity's command to 'have no other gods before me,' it is difficult to conceive of any textual display that would run afoul of the Establishment Clause."²²

XI. NATURAL LAW IS NOT DEAD

The Ten Commandments cases do serve as a reminder that natural law has not yet been extinguished in this country, for judges and juries still seek to do justice, even on the rare occasion when to obey the law will result in injustice. Natural law is found in the Supreme Court's decision of *Brown v. Board of Education*,²³ where the Court unanimously held it was wrong to follow decades of the old doctrine of separate but equal, a doctrine that resulted in little African-American girls and boys thinking they were morally inferior to white-skinned boys and girls. Natural law is found in the Nuremberg trials, where the judges held that following orders and positive law was not a defense to genocide of millions of human beings. Natural law is also found in the *Letter from the Birmingham Jail*, wherein Dr. Martin Luther King Jr. cited to Thomas Aquinas to claim the

²¹ Deuteronomy 5:7.

²² *Van Orden*, 545 U.S. at 735 (Stevens, J., dissenting).

²³ 347 U.S. 483, 493-95 (1954).

high moral ground in his civil rights war against racism in America.²⁴

It is natural law that establishes that there is a Higher Law that holds kings and presidents equally accountable, for no one is above the Law of God.

XII. THE FICTION OF NEUTRALITY

American jurisprudence has regrettably been hypocritical when it comes to implementing the ideals of equality and justice for all. The Supreme Court's historical decision in *Calder v. Bull*²⁵ was a pivotal case, for a clear choice was made by Justice James Iredell in favor of a constitutional doctrine of judicial review that preferred positive law over natural justice.

Since *Calder*, the prevailing attitude of judges is one of technically correct legalism emblematic of a rule by law mentality modeled by the case of *Dred Scott v. Sandford*,²⁶ which held that slaves were property and not persons. The case of *Roe v. Wade*,²⁷ which denies legal personhood to unborn human beings to clear the way for their destruction, follows in the tradition of *Dred Scott*. In this line of authority, there is no place for natural law, for the highest law of the land is the Supreme Court itself. If all human law, including the U.S. Constitution, were subordinate to the natural law, which contains within it the divine law of God, abortion would be illegal.

XIII. RELIGIOUS FREEDOM

It is in this context, then, that the battle over public displays of the Ten Commandments can be best understood, for secular humanism cannot allow any encroachment of divine law that might ultimately lead to the substitution of natural law (labeled as religious values) for positive law (that sanctions immoral

²⁴ MARTIN LUTHER KING, JR., *Letter from Birmingham City Jail* (Apr. 16, 1963), reprinted in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 289, 293 (James M. Washington ed., 1986), available at <http://www.stanford.edu/group/King/frequentdocs/birmingham.pdf> ("How does one determine whether a law is just or unjust? A just law is a man-made code that squares with the moral law or the law of God. An unjust law is a code that is out of harmony with the moral law. To put it in the terms of St. Thomas Aquinas, an unjust law is a human law that is not rooted in eternal law and natural law.").

²⁵ 3 U.S. (3 Dall.) 386, 399–400 (1798) (Iredell, J., concurring).

²⁶ 60 U.S. (19 How.) 393, 404–08, 410 (1856).

²⁷ *Roe v. Wade*, 410 U.S. 113, 157–58 (1973).

choices like abortion, same-sex marriage, and common law relationships) that is likely void, because of non-conformance to the natural law. This is why it is fiction to assume a position of neutrality in First Amendment jurisprudence, for no compromise is possible when it comes to choosing the ultimate legal authority in the contest for supremacy between humans and God.

I contend that the freedom to believe and the freedom to act are indivisible elements of the Free Exercise Clause notwithstanding legal precedent to the contrary. The language of the First Amendment is instructive, for the text does not translate into the "Free Belief Clause."²⁸

Scripture tells us that faith without works is dead. The Great Commission directs Christian believers to engage in conduct to inform others of the gospel message. The Ten Commandments mandate the supremacy of God. Freedom of conscience and religious expression are meaningless if a human being is prohibited, by law, from practicing the tenets of his or her faith, which includes the honoring of the supremacy of God, as directed by the First Commandment. Accommodation must be made under the Free Exercise Clause to those whose faith embraces the natural law and the divine law of the Founding Fathers of this nation.

Imagine if the Supreme Court dictated to Americans that we could believe in liberty, but did not have the right to fly the Stars and Stripes in any public forum, unless our flag was flown alongside other flags in order to be politically correct.

CONCLUSION

The text of the Ten Commandments is more than mere prose to a person of faith, for that text is the actual Word of God. Obedience to the Ten Commandments strikes at the heart of the current prevailing jurisprudential theories that have ousted God, and replaced divine law with secular humanism. Displays of the Ten Commandments are very real threats to upsetting the prevailing order that presides over cultural decadence, spiritual corruption, and personal rottenness.

It is hard to believe that in today's social and cultural setting anyone could seriously suggest that a display of the Ten

²⁸ See U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .").

Commandments on public property would tip the scales towards an abandonment of institutionalized paganism, anymore than the current public observance of the Thanksgiving Day holiday does. Yet this is what is feared by secular humanists, and perhaps with good reason. After all, something positive might happen in our society from daily reminders of the Law of God, such as an increased sense of duty and responsibility to others, mutual respect for one another, compliance with the rule of law, love for God and one another, and the protection of the innocent from violent crime.

Who knows, a return to biblical literacy and the restoration of natural law to its rightful place might lead to national repentance and religious revival. Otherwise, America is certain to reap what it sows, the inevitable judgment of God's anger.